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Supreme Court, U.S.
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No. 00-1072

IN THE

Supreme Court of the United States

LEONARD EDELMAN,

Petitioner,

v.

LYNCHBURG COLLEGE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

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ARGUMENT

(1) Since the petition for certiorari was filed in this case, three additional decisions have recognized the existence of the inter-circuit conflict regarding the validity of section 1601.12(b). *Jordan v. Bates USA*, 2001 WL 138409 (2d Cir. Feb. 16, 2001);[1] *Vason v. City of Montgomery, Alabama*, 2001 WL 69245 (11th Cir. Jan. 29, 2001);[2] *Preus v. Dominick's Finer Foods*, 2001 WL 58945 (N.D. Ill. Jan. 17, 2001).[3]

(2) Respondent's principal response to the petition is to criticize the court of appeals for having decided the question presented at all. The Fourth Circuit, respondent objects, "reached out unnecessarily" to pass on validity of section 1601.12(b)(Br. Opp. 5); "the issue did not have to be reached." (Br. Opp. 11). Respondent acknowledges that in the court below it presented "a challenge to the validity of the regulation" (Br. Opp. 5 n. 4), but seemingly disavows responsibility for the Fourth Circuit's decision to sustain that challenge.

A respondent's regret that a court of appeals decided a certworthy issue is not an appropriate basis for denial of review by this Court. Respondents would always prefer that favorable court of appeals decisions rest on grounds that would not warrant a grant of certiorari.

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[1] 2001 WL at *2 n. 3 (noting "a seeming Circuit split concerning whether or not the position taken by the regulation is sustainable. Compare *Philbin v. General Elec. Capital Auto Lease, Inc.*, 929 F. 2d 321, 323 (7th Cir. 1991) . . . with *Edelman v. Lynchburg College*, 228 F. 3d 503, 508 (4th Cir. 2000)," and that the decision in *Philbin* was consistent with the Second Circuit decision in *EEOC v. Sears, Roebuck and Co.*, 650 F. 2d 14 (2d Cir. 1981)).

[2] 2001 WL at *2 n. 3 (contrasting *Edelman v. Lynchburg College*, "holding that 29 C.F.R. § 1601.12(b) . . . is invalid because it thwarts the plain language of Title VII" with *Philbin v. General Electric Capital Auto Lease, Inc.*, "upholding same regulation as not unreasonable and within EEOC's power to promulgate.")

[3] 2001 WL 58945 at *1 n. 1 ("the situation in *Philbin*, where the initial intake questionnaire was not verified, has led some other courts (most recently *Edelman v. Lynchburg College*, 228 F. 3d 503, 510-11 (4th Cir. 2000) to differ with its direct holding.")

The Brief in Opposition advances an alternative ground for affirmance, arguing that petitioner's letter to the EEOC "did not constitute a 'charge.'" (Br. Opp. 5)[4]. As respondent acknowledges, however, the court of appeals majority did not reach this issue. The existence of such unresolved contentions is not uncommon and does not militate against a grant of certiorari. The decision below is final, not interlocutory, and the holding regarding the validity of section 1601.12(b) is the sole basis of the majority opinion, not dicta. If review is granted and this Court upholds the validity of section 1601.12(b), respondent would remain free on remand to pursue any alternative arguments. *Los Angeles Police Dept. v. United Reporting Publishing Corp.*, 528 U.S. 32, 41 (1999); *West v. Gibson*, 527 U.S. 212, 223 (1999); *Roberts v. Galen of Virginia*, 525 U.S. 249, 253 (1999).

The Fourth Circuit emphatically struck down section 1601.12(b) in language similar to that used by this Court in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 69 U.S.L.W. 4048 (2001). *Compare* Pet. App. 6a ("the regulation . . . thwarts the plain language of Title VII) *with Solid Waste Agency*, 69 U.S.L.W. at 4050 ("the text of the statute will not allow" the Migratory Bird Rule); *compare* Pet. App. 11a ("we see no reason to distort Congress's mandate . . . to make room for the EEOC's regulation") *with Solid Waste Agency*, 69 U.S.L.W. at 4052 (the Migratory Bird Rule "exceeds the authority granted to respondents under . . . the CWA.") Respondent appears to contend that such a decision does not declare a regulation invalid, but holds only that the regulation cannot "validly be applied." (Br. Opp. i n. 1, 9). A decision that a regulation cannot validly be applied[5] is a decision that the regulation is invalid. Where a regulation and

[4] This argument is not a strong one. The document which respondent insists petitioner did not intend as a charge concludes with the words "I hereby file a charge of employment discrimination . . . and I call upon the EEOC to investigate this case." (Pet. App. 2a). The responsible EEOC officials submitted affidavits confirming that they regarded the November 14, 1997 letter as a legally sufficient charge. (J.App. 80-81, 90-91).

[5] The Fourth Circuit held that section 1601.12(b) is inconsistent with Title VII *because* it "permits a charge to be verified after the expiration of the limitations period." (Pet. App. 6a). Under the decision below the regulation is facially invalid, and could not be applied in any circumstances.

the underlying statute are alleged to be in conflict, "the court must determine which of these conflicting rules governs the case. This is the very essence of the judicial duty." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803).

(3) Respondent seeks to minimize the conflict regarding section 1601.12(b) by suggesting that the decisions in the Second, Fifth, Seventh, Ninth, Tenth and District of Columbia Circuits did not actually rest on that regulation, but instead "considered," "noted" or "took . . . into account" "equitable factors" present in each case. (Br. Opp. 6-9). That simply is not an accurate description of the cases in question.

Respondent suggests that the Seventh Circuit decision in *Philbin v. General Electric Capital Auto Lease, Inc.*, 929 F. 2d 321 (7th Cir. 1991) was based, not on section 1601.12(b), but "on the facts of that case," specifically EEOC's decision to treat the plaintiff's unsworn allegations as a charge. (Opp. R. 6). That is not correct. The Seventh Circuit's analysis of the verification issue relied directly on the regulation.

> [T]he central issue in this case is whether the timely Intake Questionnaire in conjunction with the subsequently filed charge satisfied the statutory time bar for Title VII claims. . . . The debate centers around the difference between 42 U.S.C. § 2000e-5(b) and a regulation promulgated pursuant to that statute, 29 C.F.R. § 1601.12(b). . . . In § 1601.12(b) . . . the EEOC then stated that "[a] charge may be amended to cure technical defects or omissions, including failure to verify the charge . . . . Such amendments will relate back to the date the charge was first filed." 29 C.F.R. § 1601.12(b). The district court decisions . . . have held that the EEOC is exceeding the authority of the statute . . . . The circuit courts of appeals that have addressed the issue hold that the EEOC has the power to decide that a subsequent verification of a written statement relates back to the date of the initial filing and satisfied the statutory requirement. . . . . We find the reasoning of the circuit courts of appeals persuasive . . . .

929 F. 2d at 322-23 (footnote omitted).[6] Respondent suggests that the Ninth Circuit decision in *Casavantes v. California State University*, 732 F. 2d 1441 (9th Cir. 1987), did not uphold section 1601.12(b), but merely relied on "equitable considerations" to permit relation-back of verification. (Br. Opp. 8). That is not correct. The Ninth Circuit opinion rests squarely on the regulation.

> Casavantes argues that his filing of an Intake Questionnaire satisfied the statutory obligation to initiate the administrative process within the required 300-day period. We agree. . . .
>
> The University . . . notes that both Title VII and its accompanying regulation provide that a charge shall be . . . verified, . . . and that no spaces are provided on the Intake Questionnaire for . . . verification . . .
>
> We observe that the same regulation permitting wide latitude in the content of the charge also includes an amendment procedure . . . . 29 C.F.R. § 1601.12(b). Consequently, while Casavantes' questionnaire was not signed or verified, those deficiencies were cured by Amendment when the formal charge document was filed . . . .

732 F. 2d at 1442-43; *see id.* at 1443 n. 2.

Respondent asserts that the decision of the District of Columbia Circuit in *Simpkins v. Washington Metropolitan Transit Authority*, 1997 WL 702349 (D.C.Cir. 1997), is really a decision about "equitable tolling," and that the decision's reference to the regulation is only "in dicta." (Br. Opp. 8 n. 6). That is not correct. The court of appeals unequivocally relied on section 1601.12(b) in holding the limitations issue in that

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[6] The Seventh Circuit's discussion of the content and agency handling of Philbin's allegations concerned, not the verification issue, but whether those allegations, *verified or not*, were otherwise sufficient under Title VII. 929 F. 2d at 324-25. The Brief in Opposition, carefully read, recognizes this distinction. (Br. Opp. 6)(the court of appeals held that the intake questionnaire "qualified as a charge and could therefore be verified after the statutory period had run.")

case was to be resolved by reference to the date on which the EEOC received the plaintiff's unsworn letter rather than on the date of a later verified charge.[7] The equitable tolling issue in *Simpkins* related to when the 180 day period *began* to run, not when it ended.[8]

Respondent contends that the Second Circuit decision in *EEOC v. Sears, Roebuck & Co.*, 650 F. 2d 14 (2d Cir. 1981) was based on "equitable considerations," not on section 1601.12(b). That is incorrect.

> Federal regulations have treated the "failure to swear" as a technical defect curable by amendment. . . . 29 C.F.R. § 1601.12(b) . . . The defect was cured . . . . Although a complete absence of verification affords a basis for dismissal, . . . a mere defect in title at the time of verification does not.

650 F. 2d at 18.

Respondent acknowledges that several Fifth Circuit decisions have held that section 1601.12(b) is valid. Respondent contends, however, that the Fifth Circuit's pre-1972 decisions are distinguishable because the language of Title VII was amended in 1972. (Br. Opp. 7 n. 2). But subsequent to 1972 the Fifth Circuit has twice reaffirmed its approval of section 1601.12(b).

> Prior to passage of the 1972 amendments to Title VII of the 1964 Civil Rights Act, we rejected arguments that charges must be . . . sworn to within the applicable time period, despite the statutory requirement that private complainants file a written

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[7] 1997 WL 702349 at *3 ("Simpkins filed her charges in a letter that her attorney transmitted to the EEOC by telecopier on June 24, 1993. Although Title VII provides that a charge 'shall be in writing under oath or affirmation,' 42 U.S.C. § 2000e-5(b); . . . and although Simpkins did not file a sworn charge until July 28, 1993, the later filing amended the earlier one, and such 'relate[s] back to the date the charge was first received.' 29 C.F.R. § 1601.12(b). Simpkins filing was timely, however, only if the filing period had not run for more than 180 days as of June 24, 1993.")

[8] 1991 WL 702349 at *4-*6.

> charge under oath . . . . Although 42 U.S.C. § 2000e-5(b), as amended in 1972, now requires the filing of charges in writing under oath or affirmation by both private parties and the EEOC, we are not persuaded the amended statute compels a different conclusion.
>
> Because of the regulatory provision for cure of technical or procedural defects in 29 C.F.R. § 1601.12(b), we do not, in keeping with our past decisions, view the verification element as jurisdictional.

Price v. Southwestern Bell Telephone Co., 687 F. 2d 74, 77-78 n. 3 (5th Cir. 1982); see *Tillman v. City of Boaz*, 548 F. 2d 592, 593 n. 1 (5th Cir. 1977).[9]

Respondent suggests that the Tenth Circuit has adopted a "requirement" that section 1601.12(b) be limited to cases in which the delayed verification did not prejudice the employer. (Br. Opp. 7). That is not correct. Although the circumstances of *Peterson v. City of Wichita*, 888 F. 2d 1307 (10th Cir. 1989), involved no such prejudice, the opinion does not hold that the regulation would be invalid if prejudice were shown. The Tenth Circuit's later decision in *Welsh v. City of Shawnee*, 1999 WL 345597 (10th Cir.), disavowed any such limitation in *Peterson*.[10] If the Tenth Circuit had indeed adopted the position described by respondent, that would exacerbate rather than reduce the conflict. A holding that section 1601.12(b) is invalid if, but only if, an employer is prejudiced would conflict with the Fourth Circuit's decision that the regulation is always invalid, and with the decisions of the Second, Fifth, Sixth, Seventh, Ninth and District of Columbia Circuits that the regulation is valid without limitation.

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[9] "Letters such as the one written by Tillman are sufficient to initiate the processes of the EEOC. . . . *Georgia Power Co. v. Equal Employment Opportunity Commission*, 412 F. 2d 462 (5th Cir. 1969)."

[10] 1999 WL 345597 *5 n. 6 ("In this circuit, we have held that a subsequently filed formal charge may amend the plaintiff's unverified but timely filed EEOC 'complaint' under 29 C.F.R. § 1601.12(b), at least where there is no showing of prejudice to the charged party. See *Peterson v. City of Wichita*.")

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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